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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. [redacted] 63

GLO CO., an Illinois corporation,

Petitioner,

vs.

T. F. MURCHISON, MURCHISON AND COMPANY, a Delaware corporation, BARNSDALL OIL COMPANY, a Delaware corporation, and SUNRAY OIL CORPORATION, a Delaware corporation,

Respondents.

PETITION FOR CERTIORARI AND BRIEF IN SUPPORT THEREOF.

WILLIAM C. WINES
THOMAS H. FISHER
NORMAN CRAWFORD
Attorneys for Petitioner.

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL., LA KEVIEW 5-6581

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Respondents.

PETITION FOR CERTIORARI

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner is an Illinois corporation lawfully owning Texas real estate (in the form of a mineral interest of a value in excess of One Million Dollars) but without a permit to do business in Texas.

The United States Court of Appeals for the Fifth Circuit affirmed a decree entered in the United States Dis-

trict Court for the Western District of Texas peremptorily dismissing Petitioner's action for a decree *in rem* or *quasi in rem* to establish, clear and recover its title to its real property located in Texas, upon the sole ground that Petitioner had not procured the permit required of foreign corporations to do business in Texas. Thereby the Federal Court failed to recognize and follow the substantive law of Texas permitting foreign corporations to sue in the Texas Courts to establish, clear and recover their real property rights in Texas without securing a permit to do business in Texas.

In its decree dismissing Petitioner's action, the District Court held that Petitioner was "engaged in transacting its corporate business in the State of Texas" but found no subsidiary fact as to what business had been transacted by Petitioner in Texas. The Court of Appeals searched the record *de novo* and found as the crucial fact that Petitioner had done business in Texas by making "delivery" in Texas of a written conveyance assigning a part (but not all) of its mineral interests to Respondents. This finding was erroneous, because there was no evidence whatever in the record that the written conveyance had in fact been "delivered" within the State of Texas. The written conveyance (though signed and acknowledged by Petitioner's corporate president in Texas) did not constitute doing business in Texas because it was not effective under Texas law until Petitioner's corporate seal was subsequently affixed thereto by its secretary which was done in Illinois. The Court of Appeals in erroneously finding that the written conveyance was "delivered" in Texas misconceived the facts in the record, and in holding that the written conveyance was effective in Texas without the affixing of Petitioner's corporate seal in Texas misconceived and failed to apply the substantive law of Texas

establishing that no written conveyance of Texas real estate by a corporation is effective until the corporate seal is affixed thereto.

Petitioner seeks this Court's writ of *certiorari* because the United States Court of Appeals for the Fifth Circuit in *Glo Co.* v. *T. F. Murchison, et al.,* 208 F. (2d) 714 and 210 F. (2d) 372 (the two opinions appearing in Appendix I and Appendix II on pages 31 and 34 below), has decided an important question of local law of the State of Texas in a manner directly in conflict with applicable local decisions of the Texas Courts; has decided a Federal question in conflict with applicable decisions of this Court and the decision of other Circuit Courts of Appeals on the same matter; has so far departed from the accepted and usual course of judicial proceedings in Federal Courts of Appeals, or so far sanctioned such a departure by the United States District Court for the Western District of Texas, as to call for an exercise of this Court's power of supervision; and has decided a question of substance in such a manner as to deprive Petitioner of its real property rights in Texas in violation of the due process of law clause of the Federal Constitution.

The errors above stated emerge from and are delineated by the following facts, all of which appear from the Transcript of Record and the two opinions of the Court of Appeals for the Fifth Circuit, and none of which are or at least can effectively be disputed:

Petitioner is an Illinois corporation which has not applied for or been authorized by statutory permit to do business in Texas (Tr. 97).

Petitioner, acting within its charter powers (Tr. 193), lawfully acquired mineral interests comprising real estate located in Texas of a value in excess of One Million Dol-

lars by a purchase lawfully made in Illinois (Tr. 23). As of September 29, 1941, Petitioner conveyed a portion of said mineral interests to Respondent, T. F. Murchison, under a written conveyance which reserved to Petitioner an undivided 1/16th of 7/8ths of said mineral interests in the form of an overriding royalty (Tr. 41). Appellee, T. F. Murchison, subsequently conveyed his rights in said mineral interests derived through said written conveyance to three corporations, to-wit: Murchison and Company, Barnsdall Oil Company and Sunray Oil Corporation, with notice of Petitioner's reservation of mineral rights therein. T. F. Murchison is a resident and citizen of the State of Texas and the three corporations are all incorporated in the State of Delaware (Tr. 2, 5-6).

Petitioner brought suit in the United District Court for the Western District of Texas, within whose territorial jurisdiction the real property is located, based upon diversity jurisdiction, for a decree *in rem* or *quasi in rem* to establish, clear and recover the title to its real property consisting of its overriding royalty of 1/16th of 7/8ths of said minerals (Tr. 2-22). Count One of the Complaint sought specific performance to require Respondents to convey to Petitioner its overriding royalty of 1/16th of 7/8ths of said real property (minerals) (Tr. 8). Count Two prayed for a decree adjudging Respondents to be constructive or resulting trustees for Petitioner of its interest in said minerals (Tr. 10). Count Four prayed for a decree declaring the claims of Respondents in Petitioner's minerals to be wrongful and to constitute clouds upon Petitioner's minerals, and also prayed a decree quieting Petitioner's title thereto and removing said clouds therefrom (Tr. 15). Count Six prayed for a decree, in the form of a declaratory judgment, declaring the validity of the written conveyance of September 29, 1941 and construing Peti-

tioner's rights in said real property (minerals) thereunder (Tr. 21-2). All of the foregoing relief was for a decree *in rem* or *quasi in rem* to establish, clear and recover Petitioner's title to real property in the form of its ownership of an undivided 1/16th of 7/8ths of said minerals. The other counts of the Complaint sought damages for breach by Respondents of the grantee's executory covenants contained in said written conveyance (Tr. 13); for discovery and removal of further clouds upon Petitioner's title to its undivided 1/16th of 7/8ths of said minerals (Tr. 18); and for damages for inducing breach of the covenants of said written conveyance by Respondents (Tr. 23-4).

Both Petitioner and Respondents moved for summary judgment in the trial court (Tr. 57-62, 94-96, 123-126), and two of the Respondents moved to dismiss the action (Tr. 119-120).

Affidavits in support of and in opposition to such motions for summary judgment were filed by the respective parties (Tr. 62-69, 98-106, 133-143, 198-204). (All material facts in Respondents' affidavits were contradicted in Petitioner's affidavits, but the Court of Appeals took no notice of these conflicting affidavits. The Appellants in their briefs and oral arguments in both the trial court and Court of Appeals misstated the facts by pretending that their affidavits were uncontradicted. The Court of Appeals properly ignored the facts as stated by Respondents.)

The trial court granted Respondents' motions and peremptorily dismissed the action without trial (Tr. 220), and the Court of Appeals affirmed (Tr. 236).

I.

The sole ground presented by the Respondents' motions for summary judgment and to dismiss the action was that Petitioner was barred from the right to sue for any of the foregoing relief *in rem* or *quasi in rem* in any State or Federal Court in Texas by that portion of Article 1536 of the Revised Civil Statutes of Texas (Vernon's Texas Statutes, 1948, Vol. I, p. 543) which provides as follows:

> "No such [foreign] corporation can maintain any suit or action, either legal or equitable, in any Court of this State upon any demand, whether arising out of contract or tort, unless at the time such contract is made or tort committed the [foreign] corporation had filed its articles of incorporation under the provision of this Chapter."

The foregoing Texas Statute does not bar a foreign corporation from suing in the Texas courts for a decree *in rem* or *quasi in rem*. Under the local Texas law interpreting the foregoing Article 1536 of the Revised Civil Statutes of Texas, a foreign corporation may sue in the Texas courts

to establish, clear and recover its real property rights in Texas *without securing a permit to do business in the State of Texas.* The Texas cases are stated in the margin.[1] There are no contrary Texas cases.

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[1] **Security Co. v. Panhandle National Bank,** 93 Tex. 575, 57 S.W. 22; **Mansur & Tebbetts Implement Co. v. Beer,** 45 S.W. 972; **Eskridge v. Louisville Trust Co.,** 69 S.W. 987; **Lakeview Land Co. v. San Antonio Traction Co.,** 95 Tex. 252; 66 S.W. 766; **Byerly v. Camey,** 161 S.W. (2d) 1105, err. ref'd; **Elliott Addressing Machine Co. v. Campbell,** 159 S.W. (2d) 967); **Texas Land & Mortgage Co. v. Worsham,** 76 Tex. 556, 13 S.W. 384. In the latter **(Worsham)** case, the Supreme Court of Texas said (p. 385):

> "We do not think that **the failure of the [foreign] corporation to procure a permit,** even if such failure had the effect of preventing it from further prosecuting its business in this state, **should have the further effect of closing the courts of this state to it, so as to preclude it from asserting rights and recovering property already acquired."** (Boldface added.)

Similarly, the Texas cases are unanimous in holding that a foreign corporation may acquire real property in Texas without securing a permit to do business in Texas **(Lakeview Land Co. v. San Antonio Traction Co.,** 95 Tex. 252, 66 S.W. 766; **Texas Land & Mortgage Co. v. Worsham,** 76 Tex. 556, 13 S.W. 384; **Phillip A. Ryan Lumber Co. v. Ball,** 177 S.W. 226; **Byerly v. Camey,** 161 S.W. (2d) 1105, err. ref'd; **Wilson v. Peace,** 85 S.W. 31), it being held that only the State of Texas itself can attack or question the right of a foreign corporation to acquire property in Texas **(Jordan v. Grandfield Bridge Co.,** 290 S.W. 866; **Byerly v. Camey,** 161 S.W. (2d) 1105, err. ref'd.)

In the **Lakeview Land Co.** case, the Supreme Court of Texas said (p. 768):

> "There is no law in Texas which prohibits corporations created in other states to purchase and hold land and personal property in this state . . . The purchase of the land and contract under the facts alleged did not violate any law of Texas."

And in the **Jordan** case, the Texas Court said (p. 869):

> "Furthermore, it is the settled rule of decisions in this state that the capacity of a foreign corporation to hold land in this state, by reason of its failure to procure a permit to do business in the state, or for other reasons, can be questioned only by the state. [Texas cases cited.]"

The trial court entered the judgment of dismissal herein appealed from based exclusively upon a finding that Petitioner had not obtained a permit to transact business in Texas (Tr. 220-1). The Court of Appeals for the Fifth Circuit, in affirming the trial court in its two opinions, gave no consideration to the crucial question of local Texas law as to whether Petitioner was barred thereby from suing in the State and Federal Courts in Texas for a decree *in rem* or *quasi in rem* to establish, clear and recover its real property rights in Texas. The Court of Appeals thereby decided this crucial question of local Texas law in a way directly in conflict with the applicable Texas decisions holding that such an action by a foreign corporation is not barred under Texas law, regardless of whether it has or has not secured such a permit to do business in Texas.

II.

The trial judge found as an ultimate conclusion of fact that Petitioner was "engaged in transacting its corporate business in the State of Texas" (Tr. 220), but denied Petitioner's motion to require him to state in writing his findings of fact specially showing upon what particular and subsidiary facts this ultimate conclusion was based, and to state in writing separately his conclusions of law thereon, in accordance with the mandatory provisions of Rules 41(b) and 52(a) of the Federal Rules of Civil Procedure (Tr. 215-219). This refusal was in direct conflict with the decisions of this Court,[2] as well as with repeated decisions of

[2] **Kelly v. Everglades Drainage District,** 319 U.S. 415; **Mayo v. Lakeland Highland Canning Co.,** 309 U.S. 311; **Public Service Commission of Wisconsin v. Wisconsin Telephone Co.,** 289 U.S. 67; **Railroad Commission of Wisconsin v. Maxcy, Receiver,** 281 U.S. 82.

the United States Courts of Appeals, including the Fifth Circuit Court of Appeals itself, [4] which hold that the trial court must find, not the ultimate fact, but the subsidiary facts upon which the conclusion of ultimate fact is based. It was this refusal which led to the crucial error of fact (as to "delivery" of the written conveyance) by the Court of Appeals which is noted below.

III.

All of the material facts, and all of the immaterial facts, with a single exception, alleged in Respondents' affidavits to show that Petitioner was transacting business in the State of Texas were directly contradicted by and in conflict with the facts contained in Petitioner's affidavits, and there were therefore genuine issues as to all such material facts so as to preclude the entry of summary judgment within the meaning of Rule 56(c) of the Federal Rules of Civil Procedure (Tr. 62-69, 98-106, 133-143, 198-204). The Court of Appeals ignored every fact contained in Petitioners' and Respondents' affidavits, except the single immaterial fact mentioned below.

The single immaterial fact alleged in Respondents' affidavits, of which the Court of Appeals took cognizance, and which was uncontroverted, was that the written conveyance of September 29, 1941 was signed and acknowledged by Leander J. McCormick, as president of Peti-

[3] **Winter Park Tel. Co. v. Southern Bell Tel. & Tel. Co.,** 181 F. (2d) 341 (5 C.C.A.); **Young v. United States,** 111 F. (2d) 823; **Gary Theatre Co. v. Columbia Pictures Corporation,** 120 F. (2d) 891; **Bach v. Friden Calculating Co.,** 148 F. (2d) 407; **In re Rockford Baseball Club, Inc.,** 201 F. (2d) 685; **Maher v. Hendrickson,** 188 F. (2d) 700; **Smith v. Dental Products Co.,** 168 F. (2d) 516; **Dearborn Casualty Co. v. Consumer Petroleum Co.,** 164 F. (2d) 332; **Publicity Building Realty Corp. v. Hannegan,** 139 F. (2d) 583.

tioner corporation, in Bexar County, Texas (Tr. 46-7). This fact was not material, because Petitioner's affidavits showed that the written conveyance of September 29, 1941 was not consummated in fact or under Texas law until J. W. Alder, secretary of Petitioner corporation, affixed his signature and the corporate seal of Petitioner corporation in Chicago, Illinois (Tr. 203).

Under Article 1322 of the Revised Civil Statutes of Texas, and under the Texas decisions construing it, no written conveyance of real property in Texas when made by a corporation, whether domestic or foreign, is effective in Texas unless and until the corporate seal is affixed thereto. Article 1322 provides as follows:

> "Art. 1322. *Conveyances.*—Any corporation may convey lands by deed, sealed with the common seal of the corporation, and signed by the president or vice-president or presiding member or trustee of said corporation, or in common form without seal by its attorney in fact where the instrument constituting such attorney in fact is executed in said manner first mentioned. Such deed, when acknowledged by such officer or attorney in fact to be the act of the corporation or proved in the manner prescribed for other conveyances of lands, may be recorded in like manner and with the same effect as other deeds."

Typical Texas cases holding that a corporate seal must be affixed to a conveyance of real property to make it effective in Texas are cited in the margin.[4] The statement by the Court of Appeals (Tr. 281) that the 1941 conveyance was effective in Texas "in contemplation of law" without the corporate seal (which was affixed in Illinois) (Tr. 203) shows that that Court misconceived and failed to apply the Texas law.

In its effort to escape the foregoing rule, the Court of Appeals in both of its two opinions erroneously held as a fact, because such holding was without any basis in the record therefor, that Petitioner had "delivered" the written conveyance of September 29, 1941 to Respondent, Murchison, within the State of Texas (Tr. 234, 247).

There is no showing or basis in this record to sustain the Court of Appeals' finding as a fact that the written

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[4] **Shropshire v. Behrens,** 77 Tex. 275, 13 S.W. 1043; **Amerada Petroleum Corp. v. Mexia Big Pool Royalty Co.,** 220 S.W. (2d) 497, rehg. den., err. ref.

In the **Shropshire** case, the Supreme Court of Texas said (p. 1043):

> "While the use of seals has been rendered unnecessary to the validity of contracts between individuals, the statutes of this state (Texas) still require that corporations shall evidence their contracts by use of their corporate seals . . . We think it is clear that the instrument in question, because not executed under the corporate seal, is insufficient to convey to the assignee any real estate owned by the corporation, which, to give validity to the assignment, was necessary."

And in the **Armarado Petroleum Corporation** case, the Texas Court was required to determine the validity of an oil "lease" (a conveyance of minerals under Texas law) which had been signed by the corporate grantor's President **but not sealed,** exactly as in the case at bar. The Court said (p. 501) that said oil lease even though

> "Executed by the President of the Corporation (grantor) was not valid unless there was impressed thereon the corporate seal."

conveyance of September 29, 1941 was "delivered" in Texas, and no such finding of fact was made by the trial court or claimed by Respondents. In its second opinion, the Court of Appeals candidly stated (Tr. 247) that

> "We *got the idea* [*sic*] of the contract being delivered in Texas from paragraph 3 of count one of appellant's complaint, from which we quote as follows:
>
> > 'On September 29, 1941, plaintiff was the owner of certain mineral interests in certain lands in Jim Wells County, Texas, more particularly described in the written instrument bearing said date hereinafter described. On said date, plaintiff executed and delivered to defendant, T. F. Murchison, said written instrument, a copy of which is attached hereto and made a part hereof, marked "Exhibit 1." Thereafter said written instrument was duly recorded in Volume 34, at page 158 of the Oil and Gas Lease Records of Jim Wells County, Texas.' " (Italics added.)

As Petitioner pointed out in its Second Petition for Rehearing (Tr. 249-250), the foregoing erroneous finding of fact upon which the Court of Appeals' decision explicitly turned, to the effect that the Petitioner had as a matter of fact "delivered" the 1941 conveyance in Texas, was not supported by any statement in the above-quoted paragraph from the Complaint or by any other record evidence (Tr. 249-250), in spite of the "idea" of the Court of Appeals supposedly derived solely from the quoted portion of Petitioner's Complaint. In other words, the Court of Appeals' entire decision peremptorily dismissing Petitioner's action turned upon the completely erroneous fact or inference (or "idea", to quote the Court of Appeals), which was totally unsupported by the pleadings of

affidavits in the record, that Petitioner had "delivered" the 1941 conveyance in Texas.[5]

Insofar as the Court of Appeals' decision held that the 1941 conveyance constituted doing business, without either the affixing of the corporate seal of Petitioner corporation or the "delivery" thereof having taken place in the State of Texas, the decision of the Court of Appeals constituted a decision of an important question of local Texas law in a way directly in conflict with the Texas statute and the applicable Texas decisions declaring the ineffectiveness in Texas of any corporate conveyance of real property until the corporate seal is affixed.

Petitioner was thereby deprived of its real property of a value in excess of One Million Dollars by the declaration as to "delivery" of the conveyance in Texas made only by the Court of Appeals (without any similar finding in the trial court) which was utterly without any basis in the evidence or in Texas law. Such a decision is not only an erroneous decision of a Federal question as to the propriety of a summary judgment under Federal Rules of Civil Procedure, which decision is in conflict with applicable decisions of this Court and the other Circuit Courts of Appeals, but constitutes such a flagrant violation of rudimentary justice, and therefore such a departure from the accepted and usual course of judicial procedure, as to call for an exercise of this Court's power of supervision.

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[5] The Court of Appeals, by way of make-weight, also said that the 1941 conveyance was negotiated and prepared in Texas (Tr. 247). These statements were directly challenged and contradicted by Petitioner's affidavits (Tr. 198-203) and were not even supported by Respondents' affidavits (Tr. 128-132, 166-8). These affidavits raised such issues of material fact as to preclude a peremptory judgment under the Federal Rules.

To sum up, the Court of Appeals has therefore decided two important questions of local law of the State of Texas in a manner directly in conflict with the applicable statutes and decisions of Texas in holding (1) that Petitioner as a foreign corporation cannot sue in Texas, in either a State or Federal Court, for a decree *in rem* or *quasi in rem* to recover its real property rights in Texas without securing a permit to do business in the State of Texas, and in holding (2) that the signing of a corporate conveyance of real property by the Petitioner's president in Texas, followed by the affixing of the corporate seal to the conveyance outside the State of Texas and by non-delivery in Texas of such conveyance, constitutes doing business in the State of Texas within the prohibition of Article 1536 of the Texas Statutes, thereby depriving Petitioner of its right to recover, by a decree *in rem* or *quasi in rem*, its real property of a value in excess of One Million Dollars.

By refusing to follow the mandatory provisions of the Federal Rules of Civil Procedure and the Federal cases construing such rules, the Court of Appeals failed to require the trial court to make findings of subsidiary fact and conclusions of law under the mandatory provisions of the rules, and itself drew an erroneous and wholly unfounded inference as to the fact of "delivery" of the 1941 conveyance within the State of Texas without any support from the record, thereby deciding a Federal question under the Rules of Civil Procedure in conflict with the applicable decisions of this Court and the other Courts of Appeals. The Court of Appeals thereby so far departed from the accepted and usual course of Federal judicial proceedings as to call for an exercise of this Court's power of supervision.

BASIS UPON WHICH IT IS CONTENDED THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.

Jurisdiction is invoked under the Act of Congress of June 25, 1948, C. 646, 62 Stat. 982; U.S.C.A. Title 28, Sec. 1254.

The opinion of the Court of Appeals became final by denial of Petitioner's Second Petition for Rehearing on March 16, 1954 (Tr. 301), and within ninety days prior to the filing of this Petition.

THE QUESTIONS PRESENTED.

The questions presented are:

(1) Did the Court of Appeals' affirmance of the trial court's peremptory dismissal of this action (without a trial) decide an important question of local Texas law in a manner directly in conflict with applicable local decisions of the Texas courts by preventing Petitioner from suing in the Federal Court in Texas for a decree *in rem* or *quasi in rem* to establish, clear and recover its real property rights in Texas without securing a permit to do business in the State of Texas?

(2) Did the Court of Appeals, by holding that the signing and acknowledgment of a conveyance of real property by Petitioner's president in Texas, when followed by the affixing of Petitioner's corporate seal outside of Texas, brought Petitioner within the prohibition of Section 1536 of the Revised Civil Statutes of Texas, decide an important question of the local law of the State of Texas in a manner directly in conflict with the statutes and decisions of Texas?

(3) Did the Court of Appeals, by its erroneous finding, because based upon no evidence in the record, that Petitioner had "delivered" in Texas the 1941 conveyance of real property located in Texas and thereby brought Petitioner's suit for a decree *in rem* or *quasi in rem* to establish, clear and recover its real property within the prohibition of Section 1536 of the Revised Civil Statutes of Texas, so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

(4) Did the Court of Appeals, by its refusal to require the trial court to make special findings of fact and separate conclusions of law under the mandatory provisions of Rules 52(a) and 41(b) of the Federal Rules of Civil Procedure, decide a Federal question in conflict with applicable decisions of this Court and the other Courts of Appeals on the same matter?

(5) Did the Court of Appeals' decision deprive Petitioner of its real property in Texas without due process of law under the 5th Amendment of the Federal Constitution?

REASONS RELIED UPON FOR GRANTING OF THE WRIT.

(1) The Court of Appeals, by depriving Petitioner of the right to sue in the Federal Court in Texas for a decree *in rem* or *quasi in rem* to establish, clear and recover its real property rights in Texas without securing a permit to do business in the State of Texas, has decided an important question of local law of the State of Texas in a manner directly in conflict with the Texas statute and the applicable local decisions of the Texas Courts.

Article 1536 of the Revised Civil Statutes of Texas provides that no foreign corporation may sue in Texas "upon any demand, whether arising out of contract or tort, unless at the time such contract is made or tort committed," the foreign corporation has procured a permit to do business in Texas.

The local Texas decisions (which are cited in the margin on the preceding page 7 above) clearly hold that the foregoing statute does not apply to suits by a foreign corporation for a decree *in rem* or *quasi in rem* to establish, clear and recover its real property rights in Texas. There was, therefore, no just ground under Texas law for the peremptory dismissal of Petitioner's action for a decree *in rem* or *quasi in rem* to establish, clear and recover its real property in Texas. If such statute had been so construed by the Texas courts as to deprive Petitioner as a a foreign corporation of its property rights lawfully acquired and owned by it in Texas, the statute would violate the 5th Amendment of the Federal Constitution by depriving Petitioner as such foreign corporation of its property without due process of law.

The Court of Appeals has therefore decided an important question of substance which ought to be decided by this Court.

(2) The Court of Appeals, by peremptorily dismissing Petitioner's action upon the ground that the signing and acknowledging of a conveyance of real property by Petitioner's president in Texas, when followed by the affixing of Petitioner's corporate seal outside of Texas, constituted doing business by Petitioner in Texas within the prohibition of Section 1536 of the Texas Statutes, decided an important question of local law of the State of Texas

in a manner directly in conflict with the applicable Texas statute and local decisions of the Texas courts.

Article 1322 of the Revised Civil Statutes of Texas provides that no written conveyance of real property in Texas by a corporation is effective until "sealed with the common seal of the corporation."

Both the foregoing statute, and the local Texas decisions construing it on precisely similar circumstances clearly establish that the signing and acknowledging of the 1941 conveyance, without the affixing in Texas of the corporate seal of Petitioner, was not such action in the State of Texas as to constitute doing business within the prohibition of Article 1536 of the Revised Civil Statutes of Texas barring a foreign corporation from suing in the courts of Texas "upon any demand, whether arising out of contract or tort." The Texas cases are cited in the margin on the preceding page 11 above.

The Court of Appeals has therefore decided an important question of substance which ought to be decided by this Court.

(3) The Court of Appeals, by erroneously holding, without any evidence in the record and without any finding in the trial court, that Petitioner had "delivered" the 1941 conveyance of real property in Texas and is thereby barred from suing in the Texas courts for a decree *in rem* or *quasi in rem* to establish, clear and recover its real property rights in Texas, and by peremptorily dismissing Petitioner's action upon that ground, so far departed from the accepted and usual course of judicial proceedings in Federal Courts as to call for an exercise of this Court's power of supervision.

The Court of Appeals has therefore decided an important question of substance which ought to be decided by this Court.

(4) The Court of Appeals' refusal to require the trial court to make special findings of fact and separate conclusions of law as to what constituted Petitioner's alleged "doing business" in Texas, as required by the mandatory provisions of Rules 41(b) and 52(a) of the Federal Rules of Civil Procedure and the Federal decisions construing these rules, followed by the Court of Appeals' dismissal of Petitioner's action, effectively decided a Federal question in conflict with the applicable decisions of this Court and the other Courts of Appeals on the same matter. The Federal cases are cited in the margin on the preceding pages 8 and 9 above.

The Court of Appeals has therefore decided an important question of substance which ought to be decided by this Court.

(5) The Court of Appeals' action peremptorily dismissing this case without a trial, based upon fundamental errors of Texas law following failure to enforce the mandatory provisions of the Federal Rules, deprived Petitioner of its real property in Texas without due process of law under the 5th Amendment of the Federal Constitution.

The Court of Appeals has therefore decided an important question of substance which ought to be decided by this Court.

Therefore this case presents questions of sufficient merit and importance to elicit this Court's writ of *certiorari.*

PRAYER FOR PETITION FOR WRIT OF CERTIORARI.

Wherefore, Petitioner prays for the issuance of this Court's writ of *certiorari* to review and reverse the judgment of the Court of Appeals for the Fifth Circuit in *Glo Co.* v. *T. F. Murchison, et al.*, 208 F. (2d) 714, and 210 F. (2d) 372, to the end that Petitioner's Federal rights herein claimed may be effectuated.

GLO CO., *an Illinois corporation,*
Petitioner,

By WILLIAM C. WINES,
THOMAS H. FISHER,
NORMAN CRAWFORD,
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

NO.

GLO CO., an Illinois corporation,

Petitioner,

vs.

T. F. MURCHISON, MURCHISON AND COMPANY, a Delaware corporation, BARNSDALL OIL COMPANY, a Delaware corporation, and SUNRAY OIL CORPORATION, a Delaware corporation,

Respondents.

BRIEF IN SUPPORT OF PETITION.

THE OPINIONS BELOW.

The two opinions of the Court of Appeals for the Fifth Circuit in *Glo Co.* v. *T. F. Murchison, et al,* are reported in full in 208 F. (2d) 714 and 210 F. (2d) 372, and are reprinted as Appendix I, *post,* p. 31, and Appendix II, *post,* p. 34. The order of affirmance appears at page 236 of the Transcript.

THIS COURT'S JURISDICTION.

This Court has jurisdiction to review the judgment in question under Section 1254 of the Judicial Code (Title 28 U.S.C.A. Sec. 1254).

The Second Rehearing in this cause was denied on March 16, 1954, and within ninety days of the filing of this brief.

THE QUESTIONS PRESENTED.

The questions presented, stated in the Petition for Certiorari and repeated here for this Court's convenience, are:

(1) Did the Court of Appeals' affirmance of the trial court's peremptory dismissal of this action (without a trial) decide an important question of local Texas law in a manner directly in conflict with applicable local decisions of the Texas courts by preventing Petitioner from suing in the Federal Court in Texas for a decree *in rem* and *quasi in rem* to establish, clear and recover its real property rights in Texas without securing a permit to do business in the State of Texas?

(2) Did the Court of Appeals, by holding that the signing and acknowledgment of a conveyance of real property by Petitioner's president in Texas, when followed by the affixing of Petitioner's corporate seal outside of Texas, brought Petitioner within the prohibition of Section 1536 of the Revised Civil Statutes of Texas, decide an important question of local law of the State of Texas in a manner directly in conflict with the statutes and decisions of Texas?

(3) Did the Court of Appeals, by its erroneous finding, because based upon no evidence in the record, that Petitioner had "delivered" in Texas the 1941 conveyance of real property located in Texas and thereby brought Peti-

tioner's suit for a decree *in rem* or *quasi in rem* to establish, clear and recover its real property within the prohibition of Section 1536 of the Revised Civil Statutes of Texas, so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

(4) Did the Court of Appeals, by its refusal to require the trial court to make special findings of fact and separate conclusions of law under the mandatory provisions of Rules 52(a) and 41(b) of the Federal Rules of Civil Procedure, decide a Federal question in conflict with applicable decisions of this Court and the other Courts of Appeals on the same matter?

(5) Did the Court of Appeals' decision deprive Petitioner of its real property in Texas without due process of law under the 5th Amendment of the Federal Constitution?

ARGUMENT.

The Summary Statement of the Matter Involved in the Petition is sufficient to delineate the Federal questions sought to be presented and to emphasize their moment.

The conclusive fact is that this case was peremptorily dismissed in the trial court, and the judgment was affirmed on appeal, solely upon the basis of two fundamental errors, one of applicable Texas law and the other of the crucial fact upon which the Court of Appeals' decision turned, as follows:

(1) The Court of Appeals, completely misconstruing Texas law, affirmed the peremptory dismissal of Petitioner's action upon the erroneous ground that the "doing business" statute in Texas (Article 1536) barred Petitioner, as a foreign corporation, from suing in the Texas courts for a decree *in rem* or *quasi in rem* to establish, clear and recover its real property rights, located within the territorial jurisdiction of the Federal Court in which the action was brought, in spite of clear and positive decisions in the Supreme Court of Texas to the contrary. The Texas cases are cited in the margin of page 7 above. Under Texas law, a foreign corporation is not required to obtain a permit to do business in Texas in order to bring suit in the Texas courts for a decree *in rem* or *quasi in rem* to establish, clear and recover its real property rights in Texas.

The Court of Appeals gave no consideration to this question in either of its two opinions, but erroneously assumed that Petitioner's action was not to establish, clear and recover its real property rights in Texas.

This error is shown by the fact that the Court of Appeals said in its first opinion (Tr. 234):

> "The complaint, although in seven counts, is seeking here specific performance of said contract [the 1941 conveyance] or money damages for the breach thereof."

This holding shows that the Court of Appeals completely failed to comprehend, or at least give due consideration to, the relief *in rem* or *quasi in rem* prayed in Counts One Two, Four and Six of the Complaint (Tr. 8-22), wherein it is sought to establish, clear and recover Petitioner's title to real property in Texas of a value of more than One Million Dollars.

Petitioner submits that it cannot be effectively controverted that under Texas law, as established by the cases cited in the margin on page 7 of the foregoing Petition, the Texas courts have jurisdiction to grant Petitioner the relief *in rem* or *quasi in rem* prayed in Counts One, Two, Four and Six of the Complaint, and that Petitioner is not barred under Texas law from obtaining the relief *in rem* or *quasi in rem* there prayed in the Federal Court in Texas, whether or not it procured a permit to do business in Texas.

The Court of Appeals also misconstrued the Texas law in holding that the signing of the 1941 corporate conveyance of its real property by the Petitioner corporation's President in Texas, followed by the affixing of the corporate seal to the conveyance outside of Texas, constituted doing business by Petitioner in the State of Texas, so as to bring the Petitioner within the sweep of Article 1536 of the Revised Civil Statutes of Texas. The Texas cases revealing this error of Texas law are cited in the margin on page 11 of the foregoing Petition.

This Court explicitly states, in its Rule 38, that this Court may exercise its judicial discretion to grant the writ of *certiorari* "where a circuit court of appeals . . . has decided an important question of local law in a way probably in conflict with applicable local decisions."

Under the *Erie Railroad* case,[1] the Federal Court in Texas is compelled to follow, and is bound by, the state law of Texas on the question as to whether a foreign corporation may bring a suit in a Texas court, state or Federal, for a decree *in rem* or *quasi in rem* to establish, clear and recover its real property rights in Texas.

In short, the Court of Appeals in the instant case has completely misconstrued or misapprehended the applicable Texas law, and has peremptorily dismissed Petitioner's cause of action in violation of the applicable and controlling Texas law upon both of the grounds above stated. An examination of the Court of Appeals' two opinions shows that the Court of Appeals makes no reference whatever to the Texas law upon these two crucial issues which it was required by the *Erie Railroad* case to apply in the instant proceeding, in spite of the fact that this error was the principal ground for reversal set forth in the Petitioner's briefs and which was plainly delineated in Petitioner's two Petitions for Rehearing which were filed in the Court of Appeals (Tr. 237-245, 249-264).

Petitioner does not contend that any new principle of Federal jurisprudence is involved in this matter. Petitioner maintains, however, that where the Federal Court in Texas has completely misapprehended and has failed

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[1] **Erie Railroad Co. v. Tompkins,** 304 U. S. 64. Even before the **Erie Railroad** case, the Federal courts were bound by State statutes as authoritatively construed by the State's highest court.

to mention this issue concerning the applicable Texas law in its two opinions, and has peremptorily dismissed Petitioner's cause of action by reason of such error, Petitioner has brought this case within the scope of the principle that this Court may and should grant *certiorari* because the Federal Court of Appeals thus "has decided an important question of local law in a way probably in conflict with applicable local decisions" (quoted from Rule 38 of this Court).

(2) The Court of Appeals misconstrued and misread the paragraph of Petitioner's Complaint which, though stating that the 1941 conveyance was "delivered" on a certain date, *did not state where "delivery" occurred,* and certainly did not state (as the Court of Appeals erroneously finds) that such "delivery" took place in Texas.

It cannot be denied that the Court of Appeals' entire decision rests upon this erroneous finding, which is completely unsupported by the Record, that the 1941 conveyance was "delivered" within the State of Texas. This erroneous finding was made in the absence of any finding of subsidiary facts by the trial court, in violation of Rules 41(b) and 52(a) of the Federal Rules of Civil Procedure, and the Federal cases construing those rules (see cases cited in the margin on pages 8 and 9 above).

The question whether this Court should grant *certiorari* under these circumstances goes to the integrity of the entire Federal judicial system. It is not contended that any novel principle of Federal jurisprudence is involved.

But unless this Court will grant *certiorari* when such a plain abuse of the judicial process has occurred in a Court of Appeals, it can only be concluded that this Court's power of supervision, to which reference is made in Rule 38 of this Court, is no longer operative.

To put the matter in a single sentence, Petitioner is deprived by the Court of Appeals' decision of its real property rights of a value in excess of One Million Dollars solely by reason of a finding of a purported but nonexistent fact, to-wit: "delivery" in Texas of the 1941 conveyance of real property located within the territorial jurisdiction of the trial court, without the slightest foundation or support for such finding in this Record.

Petitioner submits that this is such a departure from the accepted and usual course of judicial proceedings in the Federal Courts of Appeals as to call for an exercise of this Court's power of supervision under Rule 38 of this Court.

We realize that this Court's issuance of the writ of *certiorari* is not a matter of right, but of sound judicial discretion, and will only be granted where there are special and important reasons therefor. The common situations in which this Court frequently grants the writ are of course well known to counsel.

Fundamental justice demands that the Federal Courts of Appeal, as well as the trial courts, apply local state law with some degree of diligence and sincerity, and that the Federal Courts will not sanction the peremptory denial of justice by the finding of crucial "facts" which are based upon imagination and not upon the trial court record.

The case at bar is an extreme instance of both errors, for the Court of Appeals in this case has completely ignored the controlling local Texas law, and has also misconceived, without the slightest foundation, the central fact of alleged "delivery" in Texas of the 1941 conveyance upon which the Court of Appeals' decision turns.

This Court's duty is not only to fashion the national jurisprudence by the decision of cardinal questions of constitutional and other Federal law. It should also exert its power when the United States Court of Appeals has so far forgotten the principles of both Federal and State judicature as not only to deprive a litigant of a particular piece of property, whatever the value of the property, but flagrantly to violate rudimentary justice.

In this case the Court of Appeals has firmly held that petitioner was "doing business" in the State of Texas and is therefore disabled from seeking to recover its valuable mineral rights. In the first place, the signing by the President of a conveyance of such real property is *not* doing business under the Texas law when that conveyance did *not* become legally effective under Texas law until it was sealed by its Secretary in Illinois. In the second place, the Texas statutes simply do *not* inhibit a foreign corporation, whether it has or has not engaged in "business" under the Texas law, from suing in Texas to recover real property which lawfully belongs to it.

Finally the United States Court of Appeals' declaration that this conveyance was "delivered" in Texas is a sheer *fiat* of words. It is wholly without support in the record or in the findings of the lower court.

We respectfully submit that this case should elicit *certiorari* and reversal.

CONCLUSION.

For reasons apparent upon the record, asserted in the Petition for Certiorari and urged in this brief, it is respectfully submitted that this Court should grant *certiorari* to review and reverse the judgment of the United States Court of Appeals for the Fifth Circuit in *Glo Co.* v. *T. F. Murchison, et al.*, 208 F. (2d) 714 and 210 F. (2d) 372 (Appendix I, *post*, p. 31, and Appendix II, *post*, p. 34) to the end that Petitioner's Federal rights herein claimed may be effectuated.

Respectfully submitted,

WILLIAM C. WINES,
THOMAS H. FISHER,
NORMAN CRAWFORD,
Attorneys for Petitioner.

APPENDIX I.

In the United States Court of Appeals for the Fifth Circuit

Glo Co. v. *T. F. Murchison, et al.*, 208 F. (2d) 714

Before HUTCHESON, Chief Judge, and HOLMES and RUSSELL, Circuit Judges.

HOLMES, Circuit Judge: The appellees, in addition to filing their answers and motions for summary judgment, made their respective motion to dismiss the appellant's complaint on the ground that it was a foreign corporation doing business in Texas without a permit as required by the Statutes of Texas, and, therefore, was incapacitated to maintain said action. Articles 1529, 1536, and 2031(a), Revised Civil Statutes of Texas, 1925. The court below sustained appellees' motion, and entered a judgment of dismissal.

The complaint alleged that in September, 1941, appellant was the owner of certain mineral interests in lands located in Jim Wells County, Texas. On said date, appellant executed and delivered to T. F. Murchison a contract assigning oil and gas leases, reserving to the assignor an overriding royalty of 1/16th of the oil and gas produced. The contract provided that, upon failure of certain obligations by the assignee, the assignment would become null and void; and that it would be the duty of the assignee to reassign said leases to the assignor. The complaint further averred that there had been a failure on the part of the assignee and its assigns to pay the assignor the 1/16th provided in said contract, and that the assignee had ac-

quired new leases and renewal leases in disregard of the contract of 1941. The complaint, although in seven counts, is seeking either specific performance of said contract or money damages for the breach thereof.

The issue is whether, as a matter of law, the appellant was transacting business in the state of Texas within the meaning of the Texas statutes. The statutes of Texas provide that a foreign corporation shall procure a permit to transact business within the state and, upon failure to obtain said permit, that said corporation cannot maintain any suit in Texas upon any demand, whether arising out of tort or contract. Articles 1529 and 1536 of the Revised Civil Statutes of Texas.

It is undisputed that the appellant is a foreign corporation and that it failed to obtain a permit to transact business in the state of Texas. The appellant claims that it was not doing business in Texas, and that there is no evidence in the record indicating that it was. We do not concur in this contention. The contract of 1941 between the appellant and appellee Murchison was executed and delivered in Texas. Although the president of Glo Company entered into and signed said contract in Texas, the appellant asserts that it was not consummated in Texas, because the corporate seal of the company was affixed in Chicago, Illinois.

The Texas courts have held that a single transaction will constitute the doing of business within the meaning of said articles 1529 and 1536, requiring foreign corporations to obtain permits before doing business in the state. *Smythe Co.* v. *Fort Worth Glass and Sand Co.,* 105 Texas 8, 142 S. W. 1157. The business of the appellant was, as shown by its corporate charter, the acquisition, ownership,

and disposition of mineral leases. It is shown by the allegations of the complaint and the exhibit attached thereto that the appellant was engaged in the business for which the corporation was organized. Those transactions, as shown by said exhibit, had to do with the acquisition and assignment of leasehold and mineral interests in lands located within the state of Texas. It is further recited in said contract of 1941 that the assignor was, at the time of the execution of said instrument, negotiating and attempting to procure new oil and gas leases covering lands located in Texas to be assigned to the assignee.

It is recognized in Texas that transactions involving the acquisition and transfer of oil, gas, and mineral leases upon Texas lands constitute intrastate business. *Normandie Oil Corp.* v. *Oil Trading Co.,* 163 S. W. (2) 179. The important factor in the just-cited case was that the plaintiff was transacting business pursuant to its charter by entering into negotiations for the sale of mineral leases in Texas even though the sale was eventually consummated in New York. The appellant, Glo Company, entered into an enforceable contract in Texas, and although there was no conveyance of the mineral interests until the seal of appellant was affixed, it was sufficient to constitute doing business in Texas. The transactions, as shown by the complaint and exhibit attached thereto, show as a matter of law that appellant was transacting its corporate business in Texas. *Normandie Oil Corp.* v. *Oil Trading Co., supra.*

The court below properly granted the motion to dismiss, but the judgment should be modified so as to provide for a dismissal without prejudice, as there has been no adjudication upon the merits. Accordingly, the judgment appealed from is modified and affirmed.

Modified and Affirmed.

APPENDIX II.

In the United States Court of Appeals for the Fifth Circuit

Glo Co. v. *T. F. Murchison, et al.*, 210 F. (2d) 372

ON PETITION FOR REHEARING

Before HUTCHESON, Chief Judge, and HOLMES and RUSSELL, Circuit Judges.

HOLMES, Circuit Judge:

"The Court rests its entire decision upon a single erroneous finding of fact (p. 3):

> 'The contract of 1941 between the appellant and appellee Murchison was executed and delivered in Texas.'

"This statement as to delivery in Texas is erroneous, and it is impossible to understand how the Court fell into this crucial error.

"There is not one single word in the Defendants' affidavits stating that the conveyance of 1941 was either 'executed' or 'delivered' in Texas. In fact, the Defendants' affidavits do not make any reference whatsoever to the place of execution or delivery of the conveyance of 1941.

"It is most significant that Appellees' Briefs in this Court do not assert or contend that the 1941 conveyance was 'delivered' in Texas.

"The sole evidence, as to the place of execution of the conveyance, is that the president of Plaintiff signed and acknowledged it in Texas, as shown by the 1941 conveyance attached to the Complaint (R. 46-7). This acknowledgment does not show that the 1941 conveyance was 'delivered' in Texas.

"How can this Court conceive the crucial fact that the 1941 conveyance was 'delivered in Texas' when there is not one single scintilla of evidence to support this statement?

> "The Court has misconceived the crucial ground for its affirmance of the trial court's judgment."

With italics and emphasis by capitalization omitted, the above is an exact quotation from the opening paragraphs in appellant's petition for rehearing.

We got the idea of the contract being delivered in Texas from paragraph three of count one of appellant's complaint, from which we quote as follows:

> "On September 29, 1941, plaintiff was the owner of certain mineral interests in certain lands in Jim Wells County, Texas, more particularly described in the written instrument bearing said date hereinafter described. On said date, plaintiff executed and delivered to defendant, T. F. Murchison, said written instrument, a copy of which is attached hereto and made a part hereof, marked 'Exhibit 1.' Thereafter said written instrument was duly recorded in Volume 34, at page 158 of the Oil and Gas Lease Records of Jim Wells County, Texas."

The foregoing allegations were reiterated in each of the other six counts of appellant's seven-count complaint.

The contract in this case was one for the assignment of interests in oil and mineral leases on land or lands lying and being situated in Texas. Negotiations with reference to the transaction were conducted in Texas by the parties thereto. The contract was prepared and signed in Texas. It was then sent out of the state to have the seal of the assignor affixed thereto; thereafter it was returned to Texas. The affixing of the seal was but one formal step in the process of carrying out the contract that was to be performed in Texas. The laws of Texas may not be circumvented merely by affixing appellant's corporate seal out of the state after all other acts and things necessary for a contract in contemplation of law were done in Texas.

The petition for rehearing is *Denied.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 752

GLO CO., an Illinois Corporation,

Petitioner,

vs.

T. F. MURCHISON, MURCHISON AND COMPANY, a Delaware Corporation, BARNSDALL OIL COMPANY, a Delaware Corporation, and SUNRAY OIL CORPORATION, a Delaware Corporation,

Respondents.

BRIEF OF RESPONDENTS, T. F. MURCHISON AND MURCHISON AND COMPANY, IN OPPOSITION TO PETITION FOR CERTIORARI

I

The motions to dismiss were properly sustained by the District Court because the record shows that the petitioner, GLO CO., was transacting its corporate business in the State of Texas without having obtained a permit to do business in Texas.

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I

The motions to dismiss were properly sustained by the District Court because the record shows that the petitioner, GLO CO., was transacting its corporate business in the State of Texas without having obtained a permit to do business in Texas.

In the motion to dismiss, filed in the District Court by the respondents, it is stated:

> "The plaintiff, GLO CO., is a corporation for pecuniary profit, organized and existing under and by virtue of the laws of the State of Illinois, and plaintiff had not, at the time of any of the transactions set forth in the complaint, obtained a permit from the Secretary of State of the State of Texas to transact business in this state, as required by Article 1529, Revised Civil Statutes of Texas, and the plaintiff corporation was at all of said times engaged in transacting the corporate business in the State of Texas which its charter authorized and which constituted the transaction of intrastate business. Therefore, under Article 1536, Revised Civil Statutes of Texas, plaintiff cannot maintain this action." (Tr. 119-120.)

Article 1529, **Revised Civil Statutes of Texas,** relating to permits to foreign corporations to transact business in Texas, provides:

> "Any corporation for pecuniary profit, except as hereinafter provided, organized or created under the laws of any other state, or of any territory of the United States, or of any municipality of such state or territory, or of any foreign government, sovereignty or municipality, desiring to transact or solicit business in Texas, or to establish a general or special office in this state, shall file with the Secretary of State a duly certified copy of its articles of incorporation; and thereupon such official shall issue to such corporation a permit to transact business in this state for a period of ten years from the date of so filing such articles of incorporation."

Article 1536, **Revised Civil Statutes of Texas,** relating to penalties applicable where a foreign corporation fails to obtain a permit to transact business in Texas, provides:

> "No such corporation can maintain any suit or action, either legal or equitable, in any court of this state upon any demand, whether arising out of contract or tort, unless at the time such contract was made, or tort committed, the corporation had filed its articles of incorporation under the provisions of this Chapter."

It is undisputed that the plaintiff, Glo Co., an Illinois corporation, has never obtained a permit to transact business in the State of Texas. (Tr. 97-98, 234.)

In **Erie Railroad Co. v. Tompkins,** 304 U. S., 64, 82 L. ed., 1188, 58 S. Ct., 817, 114 ALR, 1487, the Supreme Court of the United States said: "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern."

The respondents, T. F. Murchison and Murchison and Company, by their motion for dismissal in the District Court, invoked the doctrine so clearly announced in **Erie Railroad Company v. Tompkins, supra,** namely, that "the law to be applied in any case is the law of the state." Accordingly, respondents rely on the two state statutes quoted above (Arts. 1529 and 1536) and on a decision of the Supreme Court of Texas applying and construing said statutes, **Normandie Oil Corp. v. Oil Trading Co.,** 163 S. W. 2d, 179, hereinafter quoted from, as authority for the proposition that petitioner cannot maintain this action in any

court in Texas. Hence, when the law of the State of Texas — as declared by the legislature of Texas and by the Supreme Court of Texas — is applied in a federal court within the state, the federal court will enter the same order which would be appropriate in a state court — an order of dismissal.

Articles 1529 and 1536 of the Texas Statutes do not, of course, apply to interstate business. But the business being transacted by the petitioner, Glo Co., at the times it acquired and later assigned the leasehold and mineral interests referred to in the complaint and described in the exhibit attached thereto, was, under the law as declared by the Supreme Court of Texas, intrastate business — a business having to do with the transfer of title to oil and gas leases which is a transaction involving the sale of an interest in Texas lands.

In **Normandie Oil Corp. v. Oil Trading Co., supra,** the Supreme Court of Texas said:

> "It is contended that the transaction constitutes interstate commerce. The Oil Trading Company, Inc., contended that its right to recover a commission is based not merely on the contract under which the property was listed for sale, but also on the fact that it was the 'procuring cause' of the sale, and on the fact that it did certain work resulting in a sale. The subject matter of the transaction was the sale of an interest in Texas land. The only 'commerce' involved was the transfer of title to an oil and gas lease, which, under the uniform Texas decisions, constitutes a determinable fee in real property."
>
> "The fact that part of the negotiations occurred in New York and part occured in Texas would not remove this case from the provisions of the fore-

going articles (Arts. 1529 and 1536). Here the business to be done by the Oil Trading Company, Inc., in order to earn its commission, was the conducting of negotiations in an effort to effect a sale of the Krohn lease, which was on land situated in Texas. The evidence shows beyond dispute that if such negotiations were conducted, they were conducted in part in Texas. In other words, an indivisible and essential part of the services claimed to have been rendered by this broker, in an effort to make the sale, was performed in Texas."

"This court has held that a single transaction will constitute the doing of business within the meaning of Articles 1529 and 1536, requiring foreign corporations to obtain permits before doing business in this state. Smythe Co. v. Fort Worth Glass & Sand Co., 105 Tex. 8, 142 S. W. 1157."

"The construction of Article 1529 was involved in the case of Smythe Co. v. Fort Worth Glass & Sand Co., supra, and in the opinion in that case this court, in defining what transactions were brought within the purview of such Article, said (105 Tex. 8, 142 S. W. 1161): 'It will be observed that a desire on the part of the foreign corporation to do either of three things, to transact business, or solicit business, or establish a general or special office in this state, is required to procure a permit. The fact that the act contemplates the transaction of business in this state without the establishment here of a general or special office suggests the idea that it was the evident intent of the Legislature to prevent a single, isolated, or any transaction of business in this state by a foreign corporation when done in pursuance of its general business as authorized by its charter.' "

The purpose clauses of the charter of respondent, Glo Co., an Illinois corporation, are as follows:

> "The acquisition, ownership, development, management, control, sale and other disposition of oil, gas and other minerals, including the prospecting for and discovery of minerals by any and every means, including the drilling of wells and the opening of mines.
>
> "The acquisition, ownership and disposition of oil, gas, and mineral leases and the lessees' interest thereunder, and the leasing of oil, gas, or other minerals owned by the Company to others.
>
> "The conducting of geological exploration and the making of drilling contracts in connection with the discovery and development of oil, gas and other minerals." (Tr. 193-194.)

It is shown by the allegations in the complaint and, particularly, by the exhibit attached to the complaint, that petitioner, Glo Co., in all of its transactions with respondents in this action was engaged in the business for which the corporation was organized. Those transactions had to do with the acquisition and asssignment of leasehold and mineral interests in lands within the State of Texas, which, under the holding of the Supreme Court of Texas in **Normandie Oil Corp. v. Oil Trading Co., supra,** are intrastate transactions and constitute doing business within the State of Texas.

An examination of the exhibit attached to the complaint, being an assignment dated September 29, 1941, shows that the instrument was captioned, or headed, "State of Texas, County of Bexar." It describes leasehold and mineral interests in lands situated in Jim Wells County, Texas. And the instrument was executed and acknowledged by

Leander J. McCormick, as President of the corporation, Glo Co., before a Notary Public, in and for Bexar County, Texas. Thus, the very instrument which is made the basis of the complaint in this action shows upon its face that petitioner, an Illinois corporation, was transacting its corporate business in the State of Texas. Moreover, the complaint and the exhibit attached thereto show that such corporate business being transacted in Texas was in the form of many and varied transactions relating to the acquisition, the development, exploration, and discovery of minerals in and upon lands in Texas under numerous oil and gas leases which it had theretofore acquired.

It is significant that the exhibit to the complaint (Tr. 44-45) contains the following provisions:

> "The assignor (Glo. Co.) is at the present time negotiating and attempting to procure new oil and gas leases covering lands located in the Premont Field, and it agrees to use its best efforts to procure such leases, and if successful in such efforts it agrees to assign same to the assignee, or his successors or assigns, subject to all the terms and provisions of this assignment, and with the reservation of an overriding royalty of one-sixteenth of seven-eights of all the oil, gas, and other minerals produced from the lands covered thereby, as hereinabove provided, with reference to the leases herein assigned."
>
> "The assignor is also negotiating with the holders of the overriding royalties and the oil payments hereinabove described for a reduction in the amounts thereof, and it agrees to carry on such negotiations in good faith and use its best efforts to obtain such reduction, and if successful in doing so agrees that the same shall be for the benefit of the assignee, his heirs, successors or assigns, and

shall not result in an increase in overriding royalty reserved by the assignor."

While these respondents contend that petitioner's complaint and exhibit attached thereto show, as a matter of law, that petitioner, an Illinois corporation, was transacting its corporate business in Texas, without having a permit to do business in Texas, such fact is also clearly shown by the following:

1) Affidavit of Joy Alexander McCartney, showing his activities for and on behalf of petitioner in negotiating leases on parts of the Seeligson Ranch in Jim Wells County, Texas, some of which leases are the identical leases covered by the written assignment attached to the complaint as an exhibit. (Tr. 166.)

2) The allegations made by petitioner, Glo Co., in its complaint filed in Civil Action No. 478, in the U. S. District Court, Western District of Texas, wherein McCartney was named as defendant, and wherein this same petitioner as plaintiff in that case alleged, "that the defendant agreed to devote his time and efforts to the acquisition of such leasehold and mineral estates as the agent, trustee, and fiduciary, for plaintiff." (Supp. Tr. 5.)

3) Affidavit of T. F. Murchison, showing in detail his transactions with petitioner in dealing with leasehold and mineral interests in lands located in Jim Wells County, Texas. (Tr. 128.)

4) Affidavit of J. A. Kimmey, who acted as agent for Tom Graham Oil Company in negotiations with petitioner leading up to the execution of a drilling contract between petitioner, Glo Co., and Tom Graham Oil Company at Corpus Christi, Texas, for drilling a well on the Seelig-

son Ranch in Jim Wells County, Texas, which contract and $7500.00 were deposited in escrow in a Corpus Christi, Texas, bank.

5) Affidavit of Leander J. McCormick, President of petitioner, Glo Co., dated February 21, 1941, made before a Notary Public in Nueces County, Texas, showing that the above mentioned well had been drilled and completed according to the contract. (Tr. 172.)

Thus, it is shown by the record without dispute, that petitioner, at and before the time of the making of the contract, which is attached to the complaint as an exhibit, was extensively engaged in the transaction of its corporate business in the State of Texas. And it must be borne in mind that petitioner did not acquire its rights and titles in said properties under the contract which is attached to the complaint and made the basis of its action; but petitioner, long prior to the date of that contract, had acquired, by various transfers and assignments, leasehold and mineral interests which were dealt with in the contract attached to the complaint, at a time subsequent to the acquisition of such properties by petitioner, for the purpose of exploration and development of said properties.

All of the counts in petitioner's complaint have direct reference to and seek relief under a contract which petitioner made with respondents and executed and delivered in the State of Texas on September 29, 1941, which was a date long subsequent to the date of the several assignments and transfers where rights and titles had been first acquired by petitioner in oil and gas leases on Texas lands. Petitioner executed what was, in effect, an operating contract and assignment relating to the leasehold and mineral interests which it had theretofore acquired while transact-

ing business in Texas without a permit; and it is that operating contract and assignment dated September 29, 1941, which petitioner makes the basis of its action. All of the relief sought by petitioner in its complaint in the trial court arises out of and is based upon said operating contract and assignment, wherein, by the very terms of the contract, it was shown to be transacting business in Texas and also shown to contemplate the transaction of its corporate business in Texas in the future.

In none of the cases cited and relied upon by petitioner was the action based upon a contract, as we have in this case, dealing with the operation of property in Texas acquired by a foreign corporation in transacting its corporate business in Texas. The action of petitioner here is based upon a contract, made subsequent to the acquisition of the property in Texas and at a time when petitioner was transacting its corporate business in Texas.

II.

Under the Federal Rules of Civil Procedure, special findings of fact and separate conclusions of law are not required in an order sustaining a motion to dismiss where such order shows upon its face that it is not a judgment against the plaintiff on the merits.

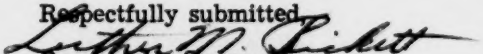
Federal Rule 41(b), relating to "Involuntary Dismissals," requires that this court make findings of fact and conclusions of law in cases tried before the court "if the court renders judgment on the merits against the plaintiff." Rule 52, relating to "Findings by the Court," states: "Findings of fact and conclusions of law are unnecessary on decisions of motions under rules 12 or 56, or any other motion except as provided in 41(b)." When the two rules are construed together, findings of fact and con-

clusions of law are not required in an order sustaining motions to dismiss, because such order would not be a "judgment on the merits against the plaintiff," as mentioned in Rule 41(b).

In any event, however, the order of dismissal (Tr. 220) does set forth the grounds of the motions to dismiss and then states, "that the material facts set forth in said motion have been established."

WHEREFORE, respondents pray that the petition for writ of certiorari be denied.

Respectfully submitted,



PATRICK H. SWEARINGEN
LUTHER M. BICKETT
San Antonio, Texas
Attorneys for Respondents

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In the Supreme Court of the United States

October Term, 1953.

Glo Co., an Illinois corporation, *Petitioner*,

vs.

T. F. Murchison, Murchison and Company, a Delaware corporation, Barnsdall Oil Company, a Delaware corporation, and Sunray Oil Corporation, a Delaware corporation, *Respondents*.

BRIEF OF RESPONDENTS, SUNRAY OIL CORPORATION AND BARNSDALL OIL COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

James C. Denton, Jr.,
Attorney for Respondents, Barnsdall Oil Company and Sunray Oil Corporation.

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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1953.

No. 752

Glo Co., an Illinois corporation, *Petitioner*,

vs.

T. F. Murchison, Murchison and Company, a Delaware corporation, Barnsdall Oil Company, a Delaware corporation, and Sunray Oil Corporation, a Delaware corporation, *Respondents*.

BRIEF OF RESPONDENTS, SUNRAY OIL CORPORATION AND BARNSDALL OIL COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is reported at 208 F. (2d) 714 and its opinion in denial of rehearing appears at 210 F. (2d) 372 (also shown at Tr. 233-235 and 246-248).

In February of 1951 petitioner brought this action in the United States District Court for the Western District of Texas, San Antonio Division, against T. F. Murchison, an individual, Murchison and Company, a Delaware corporation, Sunray Oil Corporation, a Delaware corporation, and Barnsdall Oil Company, a former Delaware corporation, previously merged into Sunray Oil Corporation.

The respondents, Sunray Oil Corporation and Barnsdall Oil Company, in addition to their Answer and Motion for Summary Judgment, moved to dismiss the complaint on the grounds that petitioner was a foreign corporation doing business in Texas without a permit, as required by Articles 1529, 1536, and 2031(a), of the Revised Civil Statutes of Texas, 1925, and therefore was incapacitated to maintain the suit (Tr. 187, 119, 120).

Thereafter, the trial court set for hearing both the motions for summary judgment and those to dismiss (which had been filed by all respondents) and, on said hearing, sustained the motions to dismiss without action on the motions for summary judgment (Tr. 214). Petitioner thereafter filed its motion for the trial court to make written findings of fact and conclusions of law (Tr. 215-216) which said motion was overruled by the court (Tr. 219). Judgment dismissing plaintiff's action was then entered in accordance with the trial court's prior ruling (Tr. 220, 221).

Petitioner perfected its appeal from such judgment and ruling of the trial court to the United States Court of Appeals for the Fifth Circuit. Such appeal was based solely on the trial court's dispositon of the case on respondents' motions to dismiss (Tr. 221 and 224-225).

The United States Court of Appeals on January 6, 1954, after hearing argument of counsel in the matter, entered judgment modifying the judgment of the trial court so as to provide for a dismissal without prejudice and, as so modified, the judgment of the trial court was affirmed (Tr. 236, with opinion at Tr. 233).

On January 20, 1954, petitioner filed its petition for rehearing in the United States Court of Appeals for the Fifth Circuit (Tr. 237), which was denied by that court on

February 12, 1954 (Tr. 248), with opinion appearing at 210 F. (2d) 372 (Tr. 246). Thereafter, on February 27, 1954, petitioner filed its second petition for rehearing (Tr. 249) which was denied by the United States Court of Appeals for the Fifth Circuit without opinion (Tr. 265).

Petitioner is an Illinois corporation (Tr. 189), chartered to carry on what may be described as the business of purchase and sale, exploration and development of oil and gas property, and the sale of the production therefrom, all for pecuniary profit (Tr. 190-197 at 193-194).

Petitioner has not received a permit to do business in Texas, nor has it filed its Articles of Incorporation in the Office of the Secretary of State of the State of Texas pursuant to Articles 1529, 1536, or 2031(a), Revised Civil Statutes of Texas, 1925 (Tr. 97-98).

Petitioner's action is a civil action based on diversity of citizenship of the parties (Tr. 2, 9, 11, 13, 15-16, 19, 22). All counts of the complaint are based on the 1941 contract (Tr. 8, 10, 13, 14-15, 17-18, 21-22, 23-24), and that contract is attached as Exhibit 1 to the complaint (Tr. 24-47).

By the 1941 contract, petitioner assigned to the individual, T. F. Murchison, twenty-three oil and gas leases on lands in the R. P. Haldeman Subdivision of the Seeligson Ranch, Jim Wells County, Texas (Tr. 36-41). The contract itself showed that the primary terms of six of such leases expired in 1941 (Tr. 25, 26, 27, 32, 35), seven of them expired in 1942 (Tr. 26, 28, 28-29, 31, 32, 33, 34), three expired in 1943 (Tr. 24-25, 27-28, 34-35), and four of them expired in 1945 (Tr. 26-27, 29-30, 30, 31-32). The 1941 contract states that the two remaining leases, No. 20 and No. 25, were then held by gas production (Tr. 33, 33-34). Only certain zones under twenty acres of land covered by said

lease No. 20 were assigned by the 1941 contract (Tr. 40), and this interest is the same interest under the same lease that petitioner, as owner thereof, did assign to Sunray Oil Corporation and Murchison and Company on August 31, 1950 (Tr. 82-90). Lease No. 25 is subject to another action, brought by petitioner, Civil Action 1440 in the United States District Court for the Western District of Texas, San Antonio Division, and to which action none of the respondents herein is a party.

The 1941 contract sued on by petitioner reserved unto petitioner an overriding royalty in said leases of 1/16 of 7/8 (Tr. 41). It provided:

> "The assignor is at the present time negotiating and attempting to procure new oil and gas leases covering lands located in the Premont Field, and it agrees to use its best efforts to procure such new leases, and if successful in such efforts it agrees to assign same to the assignee, or his successors or assigns, subject to all the terms and provisions of this assignment," (Tr. 44)

and,

> "The assignor is also negotiating with the holders of the overriding royalties and the oil payments hereinabove described for a reduction in the amounts thereof, and it agrees to carry on such negotiations in good faith and use its best efforts to obtain such reduction, and if successful in doing so agrees that the same shall be for the benefit of the assignee, his heirs, successors or assigns, and shall not result in an increase in overriding royalty reserved by the assignor." (Tr. 45)

Petitioner, in its complaint, recites:

> "Plaintiff has duly performed each and all of the obligations required to be performed by plaintiff under said written instrument in the manner and form therein set forth." (Tr. 3)

and that

> "Plaintiff thereafter procured and assigned to defendant, T. F. Murchison, under the provisions of the paragraph at the foot of page 13 of said written instrument,"

other leases on land located in the Premont Field in Jim Wells County, Texas (Tr. 3).

This 1941 contract, now sued on by plaintiff, was executed for plaintiff by Leander J. McCormick, its president, and acknowledged by him in Bexar County, Texas, on September 29, 1941 (Tr. 46-47).

During the latter part of 1940 and throughout the year 1941 Joy Alexander McCartney, a resident of Bexar County, Texas, was employed and engaged by petitioner as its agent in Texas, investigating the geology of land in Galveston County, Texas, and as such agent did negotiate for and acquire leasehold and mineral estates on lands in Galveston County and Jim Wells County, Texas, in his own name and in the name of nominees of said petitioner, all for the use and benefit of the petitioner-corporation (Tr. 166-168).

In *Glo Co.* v. *Joy A. McCartney,* Civil File No. 478, District Court of the United States for the Western District of Texas, San Antonio Division, the petitioner in this action, in its complaint against McCartney, alleged that in October, 1940, McCartney represented to petitioner's organizers and stockholders that he could procure oil and gas leases and mineral estates in Texas if they would furnish him the capital therefor, including that necessary to clear the titles and purchase leasehold estates on certain land in the Alta Loma Subdivision of the Lemuel Crawford Survey in Galveston County, Texas; "that the defendant (McCartney)

agreed to devote his time and efforts to the acquisition of such leasehold and mineral estates as the *agent, trustee and fiduciary for plaintiff and its organizers*" (emphasis added) and that plaintiff advanced various sums of money to McCartney therefor; that McCartney at the time of the suit held title to "leasehold and mineral estates in Sections 71, 72, 76, 77, 78, 80 and 81 of R. P. Haldeman Subdivision of the Seeligson Ranch in Jim Wells County, Texas," which he had purchased with plaintiff's money so advanced, etc. (See Supplemental Transcript of Record and Second Supplemental Transcript of Record.)

In January of 1941, the petitioner-corporation, Glo Co., by and through its president, Leander J. McCormick, did negotiate in Corpus Christi, Nueces County, Texas, with the Tom Graham Oil Company for the drilling of a well on twenty acres of land in Section 76 of the R. P. Haldeman Subdivision of the Seeligson Ranch in Jim Wells County, Texas. The agent of Tom Graham Oil Company was J. A. Kimmey, its employee and landman. All of the *negotiations* for this drilling contract were conducted and consummated in Corpus Christi, Nueces County, Texas (Tr. 169-171). Accordingly, Glo Co. and Tom Graham Oil Company entered into a drilling contract and escrow agreement under date of January 14, 1941, which provided for the drilling of a well on the aforesaid leased Texas land of Glo Co. "at the direction of Owner and at Owner's risk as to the successful completion thereof." Glo Co. deposited $7,500.00 in escrow with this agreement in the Corpus Christi Bank and Trust Company in Corpus Christi, Texas, and the contract provided such sum of money should be paid to the drilling party by the bank "upon being presented with affidavit executed by duly authorized representative of Owner" (Tr. 173-180). On completion of said well, the President of Glo Co., Le-

ander J. McCormick, as such, executed in Nueces County, Texas, an affidavit as to the successful completion of said well. This was sworn to by Glo Co.'s president before Rita Harkin, a Notary Public in and for said Nueces County (Tr. 172-173).

Summary of Argument.

I.

Petitioner's suit was barred from the Texas courts and from the Federal courts sitting in Texas.

The contract sued upon was part of a series of oil and gas business transactions carried on by petitioner in Texas without a permit. The contract, itself, was executed, acknowledged and delivered by petitioner to T. F. Murchison in Bexar County, Texas, and called for further acts of petitioner in Texas which petitioner admits were performed. The Supreme Court of Texas has held that any transaction of business in Texas constitutes doing business within the meaning of the Texas statutes requiring foreign corporations to obtain business permits and that the fact that the transaction was consummated (by execution of an assignment of oil and gas leases) outside of the State of Texas did not exempt the foreign corporation from the requirement to obtain a license. Since petitioner is by Texas statute incapacitated to maintain any suit in the Texas courts on this contract, it is likewise incapacitated to maintain any such suit in the Federal court sitting in Texas.

II.

Petitioner's suit is based on contract and tort and does not affect or involve vested land title.

III.

Trial Court was not required by the Federal Rules of Civil Procedure to make special findings of fact and separate conclusions of law in support of its order dismissing the action.

Rule 41(b) of the Federal Rules of Civil Procedure specifically provides that a dismissal for lack of jurisdiction or improper venue is not an adjudication on the merits and, therefore, findings of fact and conclusions of law were unnecessary under Rule 52(a).

IV.

The Trial Court did not rule on respondents' motions for summary judgment.

V.

The execution of the 1941 contract necessarily included the transaction of business in Texas.

ARGUMENT.

I.

Petitioner's Suit Was Barred from the Texas Courts and from the Federal Courts Sitting in Texas.

As shown in the statement of the case above, the petitioner, a foreign corporation without a permit to do business in Texas and a corporation chartered to purchase and sell, explore and develop oil and gas leases, did, with reference to the properties covered by the contract sued on in this action, engage in what is known as an "oil and gas play" in the customary and accepted manner of oil and gas businesses operating in the State of Texas and elsewhere. The McCartney and Kimmey material shows that, prior to the contract sued on here, there was such course of conduct by plaintiff, to-wit: the geological exploration of Texas land, the acquisition of oil and gas leasehold estates thereon and the drilling and exploration of said leases. And, finally, there comes the 1941 contract here sued on, which constitutes the "farming out" of these leasehold estates in order to secure the further drilling and development thereof, which farmout agreement clearly obligates plaintiff to continue its operations in the State of Texas in connection with the enlargement of the block of leases involved.

And as has also been shown above, the 1941 contract was executed and acknowledged by the president of petitioner in Bexar County, Texas, on September 29, 1941 (Tr. 46-47), and was on that day delivered to T. F. Murchison (Tr. 128), and petitioner also admits (Tr. 3) it was negotiating and attempting to procure new leases in the Premont Field, and was also then negotiating with holders of overriding royalties and oil payments to secure a reduction of the amounts thereof, that it carried on such negotiations

in good faith and with its best efforts and thereafter, as a result thereof, procured and assigned to the respondent, T. F. Murchison, additional leases in the Premont Field, Jim Wells County, Texas (Tr. 44, 45).

In *Normandie Oil Corporation* v. *Oil Trading Company, Inc.*, 163 S. W. (2d) 179, the Supreme Court of Texas, by Justice SHARP, rendered an opinion in 1942 which would appear to be one of the latest decisions on "doing business" in Texas.

The facts in this case were: Oil Trading Company, Inc., was a New York corporation chartered to act as broker or agent in the purchase or sale of oil leases. It was employed by defendant, the Normandie Oil Corporation, to negotiate with and sell to Tide Water Oil Company the defendant's leases in the Conroe Oil Field. The plaintiff did enter into such negotiations and conferences with Tide Water in the City of New York. The Tide Water New York office referred the matter for recommendation to its vice president at Houston, Texas. The president of plaintiff corporation went to Texas and conferred with the Tide Water vice president in his Houston office. Thereafter, plaintiff's president returned to New York and Tide Water's Houston vice president recommended to the New York office that the sale be made. (The sale was consummated by assignments executed in New York.) Plaintiff sued the defendant in the Harris County District Court to recover a commission on the sale of this lease on land in Montgomery County, Texas. Plaintiff did not have a permit to transact business in Texas. The trial court granted judgment for the plaintiff, overruling defendant's request for an instructed verdict and judgment *non obstante veredicto*. The Texas Court of Civil Appeals affirmed this decision and the Supreme Court granted a writ of error. The Supreme Court of Texas held:

First: Burden is on the foreign corporation that brings the suit to show that it had a permit to do business in this state which was granted before the contract was entered into and the business transacted. (p. 181) (Citing cases.)

Second: To the contention that the transaction constituted interstate commerce:

> "The subject-matter of the transaction was the sale of an interest in Texas land. The only 'commerce' involved was the transfer of title to an oil and gas lease, which, under the uniform Texas decisions, constitutes a determinable fee in real property." (pp. 181-182) (Citing cases.)

Third:

> "The mere listing of the property with the plaintiff in New York is not controlling, *nor is the fact that the sale was consummated in New York * * * And where a non-resident corporation performs an act of a local nature, even when that act is part of a contract for the sale of goods in interstate commerce, the act is intrastate, and is subject to regulation by the state. General Ry. Signal Co.* v. *Commonwealth of Virginia, ex rel., State Corp. Comm.*, 246 U. S. 500, 38 S. Ct. Rep. 360, 62 L. ed. 854; *Smythe Co.* v. *Fort Worth Glass & Sand Co.*, 105 Tex. 8, 142 S. W. 1157.
>
> "This court has held that a single transaction will constitute the doing of business within the meaning of Articles 1529 and 1536, requiring foreign corporations to obtain permits before doing business in this state. *Smythe Co.* v. *Fort Worth Glass & Sand Co.*, 105 Tex. 8, 142 S. W. 1157; *Buhler* v. *E. T. Burrowes Co.*, Tex. Civ. App., 171 S. W. 791; *Elliott Electric Co.* v. *Clevenger*, Tex. Civ. App., 300 S. W. 91; *Motor Supply Co.* v. *General Outdoor Advertising Co.*, Tex. Civ. App., 44 S. W. (2d) 507; *Davis* v. *United Shoe Repairing Machine Co.*, Tex. Civ. App., 92 S. W. (2d) 1107; *Fate-*

Root-Health Co. v. *Howard Kenyon Dredging Co.*, Tex. Civ. App., 117 S. W. (2d) 547.

"The construction of Article 1529 was involved in the case of *Smythe Co.* v. *Fort Worth Glass and Sand Co., supra,* and in the opinion in that case this court, in defining what transactions were brought within the purview of such Article, said (105 Tex. 8, 142 S. W. 1161): 'It will be observed that a desire on the part of the foreign corporaton to do either of three things, to transact business, or solicit business, or establish a general or special office in this state, is required to procure a permit. The fact that the act contemplates the transaction of business in this state without the establishment here of a general or special office suggests the idea that it was the evident intent of the Legislature to prevent a single, isolated, or any transaction of business in this state by a foreign corporation when done in pursuance of its general business as authorized by its charter'." (p. 182) (Emphasis added.)

Fourth: Plaintiff is not entitled to maintain its suit in the courts of this State. (p. 182)

Therefore, the Supreme Court of Texas reversed the judgment of the trial court and the Court of Civil Appeals and ordered the dismissal of plaintiff's suit.

For failure to comply with Article 1529, Article 1536, Revised Civil Statutes of Texas, 1925, provides that such foreign corporation cannot maintain any suit or action, legal or equitable, in any court of the State of Texas upon any demand, whether arising out of contract or tort.

Section 1 of Article 2031(a), Revised Civil Statutes of Texas, 1925, prohibits a foreign corporation from transacting any business in the State of Texas without first filing in the office of the Secretary of State a power of attorney designating a resident citizen of Texas as its service agent.

The penalty for violation of Section 1, Article 2031(a) is contained in Section 5, which in part provides that each of any such corporation's acts in this State, as to it, shall be unlawful and void and no such acts, as to it, shall be valid; and that such corporation shall be incapable in Texas of receiving the benefit of exercising in its behalf or enjoying any right, power, privilege or immunity that shall not already have accrued. This article also provides that such corporation shall be incapacitated to maintain any suit or legal proceedings in any court of the State of Texas upon any demand, whether arising out of contract or tort.

Since, in the courts of the State of Texas, the 1941 contract (Tr. 24-47) is unlawful and void as to plaintiff corporation, and plaintiff is incapable of receiving the benefit of exercising in its behalf or enjoying any right, power, privilege or immunity thereunder, and plaintiff corporation is incapacitated to maintain any suit or legal proceedings thereon, the same is true as to plaintiff corporation before the courts of the United States sitting in Texas. *Erie R. Co.* v. *Tompkins,* (U. S. S. C., 1938) 304 U. S. 64, 82 L. ed. 1188, 114 A. L. R. 1487; *Angel* v. *Bullington,* (U. S. S. C., 1947) 330 U. S. 183, 91 L. ed. 832; and *Woods* v. *Interstate Realty Company,* (U. S. S. C., 1949) 337 U. S. 535, 93 L. ed. 1524. It is, therefore, respectfully submitted that the United States Court of Appeals for the Fifth Circuit did properly affirm (as modified) the judgment of the trial court which dismissed this action.

II.

Petitioner's Suit Is Based on Contract and Tort and Does Not Affect or Involve Vested Land Title.

Petitioner's Argument I of its Summary Statement of the Matter Involved is incorrect:

As we have previously stated herein all counts of the complaint are based on the 1941 "farmout" contract. When the complaint was filed in 1951, the leases described in the 1941 contract were no longer valid or subsisting but had expired under their own terms; excepting the two held by gas production, one of which petitioner, *as owner* thereof, itself assigned to the respondents, Sunray Oil Corporation and Murchison and Company, in 1947, and the other is the subject of a separate action by petitioner to which none of the respondents is a party. (See statement of the case above.)

Petitioner's cited cases of authority (petition for certiorari, etc., p. 7) are inapplicable and not in point because they hold only that:

(*a*) "a foreign corporation is not disabled to sue on a contract made within the state, adjusting a judgment debt arising out of business transacted outside the state, * * *"; see: *Security Co.* v. *Panhandle National Bank,* (Sup. Ct. Tex., 1900) 57 S. W. 22, headnote No. 2; or

(*b*) the subject-matter of the suit did not grow out of the business in which the corporation was engaged. See: *Mansur & Tebbetts Implement Co.* v. *Beer,* (Tex. Civ. App., 1898, writ refused) 45 S. W. 972, at 973; and *Elliott Addressing Machine Co.* v. *Campbell,* (Tex. Civ. App., 1942, no writ) 159 S. W. (2d) 967; or

(*c*) the foreign corporation was acting only as a trustee under a will, had manifested no intention to execute the trust in Texas and its suit for possession of the land did not arise out of business or transactions made in Texas. See: *Eskridge* v. *Louisville Trust Co.,* (Tex. Civ. App., 1902, writ refused) 69 S. W. 987; or

(*d*) the purchase (or making) by a foreign corporation, not otherwise doing business in Texas, of a contract made outside the state is not the transaction of business within the state by such foreign corporation so as to forbid it to maintain a suit for breach of contract in the Texas courts; see: *Lakeview Land Co.* v. *San Antonio Traction Co.*, (Sup. Ct. Tex., 1902) 66 S. W. 766; and *Phillip A. Ryan Lbr. Co.* v. *Ball*, (Tex. Civ. App., 1915, no writ) 177 S. W. 226; or

(*e*) the fact a foreign corporation did not have a Texas business permit did not vest in its stockholders the equitable title to land standing in the name of the corporation; see: *Byerly* v. *Camey*, (Tex. Civ. App., 1942; writ refused, want of merit) 161 S. W. (2d) 1105; or

(*f*) the Texas statutes did not "deprive an unregistered foreign corporation of the right to defend an action brought against it * * *"; see: *Elliott Addressing Machine Co.* v. *Campbell, supra*, 159 S. W. (2d) 967 at 969; *Byerly* v. *Camey, supra;* and *Jordan* v. *Granfield*, (Tex. Civ. App., 1926, no writ), 290 S. W. 866, at 869; or

(*g*) the 1887 Texas Permit Statute was void because it made the permit conditional on the surrender by the foreign corporation of a privilege (to remove a suit from the state to the federal court) secured to it by the Constitution and laws of the United States. See: *Texas Land Farm & Mortgage Co. Limited* v. *Worsham, et al.*, (Sup. Ct. Tex., 1890) 13 S. W. 384, at headnote No. 1 and page 385; or

(*h*) there was no allegation or showing that the foreign corporation which was the assignor of defendant had done or desired to do business in Texas, the court further stating that it was "not prepared to hold that it could not have made the assignment in question, so as to authorize

the suit by its assignee." See: *Wilson* v. *Peace,* (Tex. Civ. App., 1905, no writ) 85 S. W. 31, at 32.

III.

Trial Court was not required by the Federal Rules of Civil Procedure to make special findings of fact and separate conclusions of law in support of its order dismissing the action.

Petitioner's Argument II of its Summary Statement of the Matter Involved (petition for certiorari, etc., pp. 8-9) is incorrect:

Defendants' motions to dismiss are motions filed pursuant to Rule 12(b).

Rule 52(a) in part states "findings of fact and conclusions of law are unnecessary on the decisions of motions under Rules 12 or 56, or any other motion except as provided in Rule 41(b)."

Rule 56 applies to summary judgments and is therefore inapplicable here.

Rule 41(b) provides that findings of fact and conclusions of law shall be filed where there is an adjudication on the merits. This rule defines an adjudication on the merits as being a dismissal under any of the subdivisions set forth in said rule "other than a dismissal for lack of jurisdiction or improper venue." Thus, in effect, Rule 41(b) specifically states that a dismissal for lack of jurisdiction or improper venue is not an adjudication on the merits.

Therefore, plaintiff's motions for findings of fact and conclusions of law are without merit and the trial court did not err in overruling same.

The Order of Dismissal states, both on its face and by reference to the defendants' motions to dismiss, that plain-

tiff is a corporation for pecuniary profit, chartered in and by the State of Illinois, and had not, at the time of the transactions set forth in the complaint, obtained a permit to transact business in Texas as required by Article 1529, Revised Civil Statutes of Texas, 1925, that plaintiff at all of said times was engaged in transacting its corporate business in the State of Texas and that, therefore, under Articles 1536 and 2031(a), Revised Civil Statutes of Texas, 1925, plaintiff could not maintain this action; which said order, on its face, contains the findings and conclusions requested by plaintiff. (Tr. 220)

IV.

The Trial Court Did Not Rule on Respondents' Motions for Summary Judgment.

Petitioner's Argument III of its Summary Statement of the Matter Involved (petition for certiorari, etc., p. 9) is not in point because Rule 56(c) of the Federal Rules of Civil Procedure does not apply to respondents' motions to dismiss but instead applies only to motions for summary judgment. The trial court ruled and entered judgment only on the motions to dismiss and did not rule on the motions for summary judgment (Tr. 214, 220-221).

V.

The Execution of the 1941 Contract Necessarily Included the Transaction of Business in Texas.

Petitioner also argues that since the Texas statute, Article 1322 of Chapter 3, "General Provisions" of Title 32, "Corporations—Private," of the Revised Civil Statutes of Texas, 1925, recites that in certain circumstances the deed of a corporation of land shall contain a corporate seal,

that, therefore, *nothing* was done by petitioner with reference to the 1941 contract until the seal was placed thereon by its Secretary—which allegedly was done in Chicago, Illinois, or, perhaps, that all of the acts of petitioner in Texas were a nullity because merged, somehow, in the alleged application of the seal in Illinois.

(The instrument itself shows it was signed and acknowledged by petitioner's president in Bexar County, Texas (Tr. 46-47), in which are located the offices of T. F. Murchison, the other party to that contract. Mr. Murchison himself has sworn that the instrument was both executed and delivered to him on September 29, 1941, which is the date the instrument itself shows petitioner's president signed and acknowledged it in Bexar County, Texas, before a notary public there (Tr. 128).)

We submit that this argument is without merit. The acts of the president of the petitioner, as such, in Texas with reference to this contract cannot be ignored. The Texas statute cited by petitioner states no more than the formal requisites for the execution of a deed by a corporation. Petitioner has sued upon this contract as a contract and, in net effect, is asking no more than specific performance thereof plus damages for the alleged breach thereof (see Argument II hereinabove). There is no question but that the 1941 contract was a valid contract even in the absence of the seal of the Secretary (for example, see 10 Tex. Jur. 947, Corporations, Sec. 297). In addition, petitioner itself admits that the well which was required to be drilled by T. F. Murchison as a part of the consideration for this 1941 contract (Tr. 42) was drilled (Tr. 3) and this is confirmed by Mr. Murchison (Tr. 129). Therefore, if it were petitioner's contention also that the 1941 contract was ineffective as an assignment of the now expired leases, we are of the

opinion that T. F. Murchison could have successfully maintained an action for specific enforcement thereof since petitioner had received the benefit of such written instrument (see 38 Tex. Jur. 725, Specific Performance, Sec. 51).

In addition, the Supreme Court of Texas, in *Normandie Oil Corporation* v. *Oil Trading Company,* cited in Argument I hereinabove, reaffirmed its earlier decisions that the Texas permit statutes (Articles 1529 and 1536) applied to even a single act of transaction of business in Texas by a foreign corporation without a permit; and, in that case, the court found that the sale and assignment of Texas leases was consummated outside of the State of Texas—which is the allegation of petitioner here.

Conclusion.

It is concluded that the decision and judgment of the Court of Appeals was correct and in accordance with the statutes of the State of Texas as construed by the Supreme Court of the State of Texas and, accordingly, that the petition for certiorari must be denied.

Respectfully submitted,

JAMES C. DENTON, JR.,
Attorney for Respondents,
Barnsdall Oil Company and
Sunray Oil Corporation.

Of Counsel for Said Respondents:

JAMES C. DENTON, JR.,
M. D. KIRK,
both of First National Building,
Tulsa, Oklahoma;

MORRISON & DITTMAR,
314 Milam Building,
San Antonio, Texas.